FILE COPY

FILED
NOV 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

THE HONORABLE DANIEL P. WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL.,

Respondents.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.)

BRIEF OF THE RESPONDENTS IN OPPOSITION.

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570),

Attorneys for Respondents.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

Printed by the Authority of the State of Illinois

INDEX.

PAGE

Jurisdictional Statement 1

Statement of the Case 2

Reasons for Denying the Writ:

Neither the Fifth Nor the Fourteenth Amendment Prohibits the Use of Testimony Given Pursuant to a Grant of Full Transactional Immunity in a Subsequent Civil Proceeding Instituted to Remove the Immunized Witness from the Office of State Court Judge 6

Conclusion 18

Authorities Cited.

Cases.

Bram v. *United States*, 168 U. S. 532 (1897) 9

Brown v. *United States*, 359 U. S. 41 (1959) 10

Brown v. *Walker*, 161 U. S. 591 (1896) 9, 10

Cave v. *State of Missouri ex rel. Newell*, 246 U. S. 650 (1918) 11

Counselman v. *Hitchcock*, 142 U. S. 547 (1892) 8

Cusack v. *Howlett*, 44 Ill. 2d 233 (1969)..... 14

Friedman v. *Court on the Judiciary of New York*, 375 U. S. 10 (1963) 13

Gardner v. *Broderick*, 392 U. S. 273 (1968) 14

Grosso v. *United States*, 390 U. S. 62 (1968) 10

In Re Klebanoff, 289 N. Y. S. 2d 755 (Ct. of App. 1968) 17

In the Matter of Napolitano, 401 U. S. 951 (1971) 1, 5

In Re Sarisohn, 275 N. Y. S. 2d 355 (1966) 13

In Re Selig, 302 N. Y. S. 2d 94 (S. Ct. App. Div. 1969) 17

In Re Ungar, 232 N. Y. S. 2d 158 (S. Ct. App. Div. 1967) 17

Kastigar v. *United States*, ... U. S. ....., 92 S. Ct. 1653 (1972) 7, 8

Malloy v. *Hogan*, 378 U. S. 1 (1964) 8

Marchetti v. *United States*, 390 U. S. 39 (1968) 10

Matter of Kane v. *Rudich*, 10 N. Y. S. 2d 929 (1939) ... 13

Matter of Osterman, 13 N. Y. 2d a (1963), *cert. den. Osterman* v. *Court of the Judiciary of the State of New York*, 376 U. S. 914 (1964) 13

Murphy v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964) 8, 9

Napolitano v. *Ward*, 317 F. Supp. 79 (N. D. Ill. 1970).. 5

Napolitano v. *Ward*, 317 F. Supp. 83 (N. D. Ill. 1970).. 5

Napolitano v. *Ward*, 457 F. 2d 279 (1972) 6

One 1958 Plymouth Sedan v. *Pennsylvania*, 380 U. S. 693 (1965) 9

Reina v. *United States*, 364 U. S. 507 (1960) 10

Sarisohn v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E. D. N. Y. 1967) 13

Snowden v. *Hughes*, 321 U. S. 1 (1944) 9, 10

Taylor and Marshall v. *Beckham*, 178 U. S. 548 (1900) 11

Ullmann v. *United States*, 350 U. S. 422 (1956) 9, 10

Uniform Sanitation Men Ass'n, Inc. v. *Commissioner of Sanitation*, 392 U. S. 280 (1968) 15, 16

United States v. *United States Coin and Currency*, 401 U. S. 715 (1971) 9

Wilson v. *North Carolina*, 169 U. S. 586 (1898) 11

Zicarelli v. *New Jersey Commission of Investigation*, ____ U. S. ____, 92 S. Ct. 1670 (1972) 7, 8

Zuckerman v. *Greason*, 20 N. Y. 2d 430 (Ct. of App. 1967), *cert. den.*, 390 U. S. 925 (1968) 17

CONSTITUTIONS, STATUTES, AND COURT RULES.

Ill. Const., Art. VI, Sect. 15 11

Ill. Const. (1870), Art. IV, Sect. 4 12

Ill. Const. (1870), Art. VI, Sect. 8 2

Ill. Const. (1870), Art. VI, Sect. 18 .....11, 14

Ill. Const. (1870), Art. VI, Sect. 19 11

Title 28 U. S. C. § 1257(2) 1

Title 28 U. S. C. § 1254(1) 1

Ill. Rev. Stat. 1969, Ch. 38, § 106-1 et seq. 7, 12

U. S. Supreme Court Rule 16 2

Ill. Supreme Court Rule 51 11

OTHER AUTHORITIES.

4 Bl. Comm. 381 9

Canons of Judicial Ethics 6, 13

Note, 68 Colum. L. Rev. 785 (1968) 2

4 Steph. Comm. 447 9

Stern and Gressman, *Supreme Court Practice*, (4th ed. 1969) 2

8 Wigmore on Evidence, § 2282, 2283 (McNaughten Rev. 1961) 10

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

THE HONORABLE DANIEL P. WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL.,

Respondents.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.)

BRIEF OF THE RESPONDENTS IN OPPOSITION.

JURISDICTIONAL STATEMENT.

Petitioner grounds jurisdiction for his petition on Title 28 U. S. C. §1254(1). However, he ignores the prior decision on the merits of his case rendered by this Court in *In Re Napolitano,* 401 U. S. 951 (1971). Following his removal by the Illinois Courts Commission, petitioner appealed directly to this Court pursuant to Title 28 U.S.C. §1257(2). Respondents herein filed a Motion To Dismiss or Affirm on the basis that the appeal failed to present a substantial federal question and that the decision of the Illinois Courts Commission was correct. On March 8, 1971, this Court dismissed the appeal for want of a substantial federal question (Mr. Justice Brennan would have dismissed the appeal for want of jurisdiction). That dismissal is a decision by this Court that the totality of the proce-

dures, including the use of petitioner's immunized grand jury testimony, by which the petitioner herein was removed from the office of judge presents no substantial federal question.

Unlike a denial of certiorari, the dismissal of an appeal from a state court for want of a substantial federal question is a decision on the merits of the issues presented by the appeal. It is an expression of the court's opinion that the decision below was correct. In effect, it is the equivalent of an affirmance on the merits of an appeal from a federal court. See Stern and Gressman, *Supreme Court Practice* (4th ed. 1969) 197, 233; Note, 68 Colum. L. Rev. 785, 791 (1968); *Supreme Court Rules* 16 (1) (b) and 16 (1) (c).

Thus, the dismissal of petitioner's direct appeal by this Court is res judicata of the issue presented herein. The instant petition for writ of certiorari therefore should be denied.

STATEMENT OF THE CASE.

The petitioner herein is a former State legislator who was elected to the Municipal Court of the City of Chicago in 1963. Following the reorganization of the Illinois judicial system effective January 1, 1964, appellant automatically became an associate judge of the Circuit Court of Cook County, Illinois.[1] He was elected a full circuit judge in 1968.

In September of 1969, the Sangamon County Grand Jury began its investigation into charges relating to the administration and management of the Illinois State Fair. During this investigation, Judge Napolitano was called as a witness by the Grand Jury. He refused to answer

1. The only difference between associate judges and full circuit judges under Art. VI, sect. 8 of the Illinois Constitution (1870) is that an associate judge may not serve as Chief Judge of the Circuit Court.

any questions relating to his business dealings with the State Fair on the ground that any answers he might give would tend to incriminate him. Upon motion of the State's Attorney, Judge Napolitano was granted full transactional immunity in return for his testimony.

The petitioner returned to the Grand Jury and gave extensive testimony in which he outlined his business dealings with the State Fair management. This testimony related to the procedures whereby the petitioner secured forty-two contracts for concession space at State Fairs for each year during the period 1961 to 1969.[2] (Tr. 24)[3] Those contracts secured in advance of the Fair each year were obtained by the petitioner, using various fictitious names. Petitioner obtained additional contracts at the beginning or during a Fair by making a personal appearance at the State Fair office. Napolitano sublet most of the locations represented by the forty-two contracts which he held, keeping nine or ten spaces for himself.

The Grand Jury subsequently returned several indictments charging various State Fair officials with official misconduct and conspiracy. The petitioner was named as an unindicted co-conspirator. Several counts of these indictments were later dismissed for technical deficiencies.

At the direction of the Supreme Court of Illinois, the Chief Judge of the Circuit Court of Cook County relieved the petitioner of all assignments on February 5, 1970.

On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against Judge Napolitano. The com-

2. Prior to 1961, the appellant held more than forty-two contracts for concession stands (Tr. 24).

3. "Tr" refers to the transcript of the petitioner's testimony before the Grand Jury, which was received as evidence in the proceedings before the Illinois Courts Commission (Pl. Exh. No. 4).

plaint was filed on March 19, 1970, and charged Napolitano with impropriety and the appearance of impropriety in violation of the Canons of Judicial Ethics. The charges were supported by a specification of facts relating to the petitioner's involvement with the concession business at the Illinois State Fair.

A formal hearing into these charges began on July 7, 1970, before the Illinois Courts Commission. The petitioner was present and represented by counsel. The Commission received testimony from several witnesses and documentary evidence, including the transcript of the petitioner's testimony before the Sangamon County Grand Jury.

On July 14, 1970, the Illinois Courts Commission removed the petitioner from the office of judge of the Circuit Court, finding the evidence to be clear and convincing that the petitioner had violated the applicable Canons of Judicial Ethics.

An appeal from this decision to the Supreme Court of Illinois was dismissed on September 23, 1970, with the following statement: "Proceedings before the Commission are *sui generis* and are governed entirely by the rule which created the Commission. In the absence of a provision for appeal, no right to appeal exists."

Petitioner then appealed to the Supreme Court of the United States. In his Jurisdictional Statement, he detailed the proceedings before the Courts Commission which resulted in his removal from office. He argued that these proceedings, including the use of his Grand Jury testimony, violated his constitutional rights under Article I, Sect. 10, and the fourth, fifth, sixth and fourteenth amendments of the federal Constitution. The appellee Illinois Courts Commission filed a Motion to Dismiss or Affirm with the Supreme Court on the basis that no substantial federal

question had been presented and that the decision of the Illinois Courts Commission was correct.

On March 8, 1971, the Supreme Court dismissed the appeal for want of a substantial federal question. *In the Matter of Napolitano*, 401 U. S. 951 (1971). (Mr. Justice Brennan would have dismissed the appeal for want of jurisdiction.)

Prior to the hearing before the Illinois Courts Commission, the petitioner filed a motion with the United States District Court for the Northern District of Illinois, Eastern Division. He requested a temporary restraining order to prevent the Commission hearing and further requested the convening of a three-judge court pursuant to Title 28 U. S. C. §§ 2281 and 2284, alleging a violation of his civil rights. The motion for a temporary restraining order was denied by the single judge before whom the action was filed. A three-judge panel was convened and affirmed the denial of the temporary restraining order. The three judge panel further found that petitioner's pleadings presented no substantial federal question and terminated the panel, remanding the case to the single judge for a determination of the factual issues raised by the complaint. *Napolitano* v. *Ward*, 317 F. Supp. 79 (N .D. Ill. 1970) (Judge Decker dissenting only as to the remand to the single judge).

The District Court on August 5, 1970, denied the petitioner's request for a preliminary injunction to prevent the nomination of candidates to fill the judicial vacancy caused by his removal from office. After considering petitioner's argument that the use of his Grand Jury testimony by the Commission violated the fifth amendment privilege against self-incrimination, the District Court found that there was little likelihood that the petitioner would prevail in a final hearing on the merits of this issue. *Napolitano* v. *Ward*, 317 F. Supp. 83 (N. D. Ill. 1970).

On March 26, 1971, following the dismissal of the appeal from the decision of the Illinois Courts Commission by the Supreme Court of the United States, the District Court dismissed the petitioner's amended complaint with prejudice and entered judgment in favor of the defendants.

Petitioner appealed this judgment to the United States Court of Appeals for the Seventh Circuit. The sole issue presented by that appeal was whether testimony which had been compelled pursuant to a grant of full transactional immunity may be used as evidence in a subsequent civil proceeding to remove the witness from the office of judge.

On March 21, 1972, the Court of Appeals affirmed the judgment of the District Court. *Napolitano* v. *Ward*, 457 F. 2d 279 (7th Cir. 1972). It is from this decision that the petitioner seeks redress by writ of certiorari.

REASONS FOR DENYING THE WRIT.

Neither the Fifth Nor the Fourteenth Amendment Prohibits the Use of Testimony Given Pursuant to a Grant of Full Transactional Immunity in a Subsequent Civil Proceeding Instituted to Remove the Immunized Witness From the Office of State Court Judge.

> "A Judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach." Canon 4, Canons of Judicial Ethics.

The petitioner was removed from the office of judge of the Circuit Court of Cook County for "conduct unbecoming a Judge" in violation of the applicable Canons of Judicial Ethics including Canon 4, quoted above. The sole

issue upon which petitioner predicates his petition to this Court is whether the conduct for which he was removed from office may be established by the use of testimony which he gave before the Sangamon County Grand Jury pursuant to a grant of transactional immunity which protected him from future criminal prosecution for matters about which he testified. The use of this testimony in a civil proceeding before the Illinois Courts Commission was proper and did not infringe upon the petitioner's fifth amendment privilege against compulsory self-incrimination.

Richard Napolitano was granted full transactional immunity in return for his grand jury testimony.[4] By conferring this immunity, the State of Illinois has relinquished the right to hold the petitioner accountable in a criminal proceeding for any offense shown in whole or in part by his immunized testimony. This procedure comports fully with the mandate of the fifth amendment privilege against self-incrimination. See *Kastigar* v. *United States*, ... U. S. ....., 92 S. Ct. 1653 (1972), *Zicarelli* v. *New Jersey Commission of Investigation*, ... U. S. ....., 92 S. Ct. 1670 (1972).

The anti-incrimination prohibition of the fifth amendment, however, does not protect the petitioner from civil procedures resulting in his removal from the office of state court judge.

---

4. The statutory authority for the grant of immunity to petitioner is Ill. Rev. Stat. 1969, Ch. 38, § 106-1 which provides:

> "In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the state may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.

Section 106-2 delimits the effect of this immunity.

> "Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony."

The fifth amendment protects an individual from being compelled to be a witness against himself in a criminal case. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The privilege may be invoked in any proceeding, civil or criminal, in which testimony or evidence is requested which would expose the witness to a later criminal prosecution. The focus of the privilege, however, is directed toward the criminal proceeding. If the witness is insulated from future criminal prosecution, as was the appellant herein, there can be no question that the requirements of the privilege have been met. See *Kastigar* v. *United States, supra.; Zicarelli* v. *New Jersey Commission of Investigation, supra.*

The only revelant question then is whether the fifth amendment extends its protection to a civil proceeding to determine the fitness of a judge to continue in judicial office when the possibility of criminal sanction has been completely removed.

The fifth amendment provides that "No person . . . shall be compelled *in any criminal case* to be a witness against himself" (emphasis added). This protection is applicable to the states through the fourteenth amendment. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The Supreme Court of the United States has stated: "The Constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion." *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52, 57 n. 6 (1964) (citations omitted). The Constitution, however, does not prohibit the compulsion of otherwise incriminatory testimony if the witness has been granted immunity coextensive with the fifth amendment privilege. *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892);

Brown v. *Walker,* 161 U. S. 591 (1896); *Ullmann* v. *United States,* 350 U. S. 422 (1956); *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964).

The petitioner does not contest the validity of the immunity conferred during the proceedings in this case. The issue of whether transactional or use immunity is constitutionally required is irrelevant here. Petitioner was granted full transactional immunity. The only question is whether the fifth amendment precludes the use of statements from which all criminality has been removed in a civil proceeding inquiring into the witness' qualifications to hold judicial office.[5]

There can be no question that the fifth amendment privilege is directed solely toward protecting an individual from a criminal penalty imposed upon the basis of testimony or evidence which the individual was compelled, either by physical or mental coercion, *Bram* v. *United States,* 168 U. S. 532 (1897), or by threat of contempt, *Brown* v. *Walker,* 161 U. S. 591 (1896), to give. The holding of *Brown* is equally applicable to the instant case.

---

5. Petitioner's characterization of his removal from the bench as a "forfeiture" of his office and therefore a criminal penalty prohibited by the grant of transactional immunity, is legally deficient. A forfeiture is the "loss of lands or goods to the State as the consequence of crime." 4 Bl. Comm. 381, 387; 4 Steph. Comm. 447, 452. See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965); United States v. United States Coin and Currency, 401 U. S. 715 (1971). The office of judge of the Circuit Court of Cook County, Illinois is not property. As the Supreme Court noted in Snowden v. Hughes, 321 U. S. 1, 7 (1944):

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause."

The petitioner has not been deprived of goods or property related to the commission of a criminal offense. The concept of forfeiture clearly does not apply to petitioner's removal for cause from a state judicial office.

In *Brown* v. *Walker,* the Supreme Court reviewed the sufficiency of a federal statutory grant of immunity which protected the witness from future criminal prosecution, as does the Illinois statute pursuant to which the petitioner herein was granted immunity. The Supreme Court in *Brown* upheld the federal statute over a fifth amendment challenge, stating:

> "The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty. . . . [W]hile the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, *its object is fully accomplished by the statutory immunity,* and we are therefore of the opinion that the witness was compellable to answer. . . ." (161 U. S. at 601, 610) (emphasis added)

Accord *Ullmann* v. *United States,* 350 U. S. 422 (1956); *Brown* v. *United States,* 359 U. S. 41 (1959); *Reina* v. *United States,* 364 U. S. 507 (1960); *Marchetti* v. *United States,* 390 U. S. 39, 72, 73 (1968); *Grosso* v. *United States,* 390 U. S. 62, 72, 73 (1968) (concurring opinion of Mr. Justice Brennan). And see 8 Wigmore on Evidence §§ 2282, 2283 (McNaughten Rev. 1961).

The objective of the fifth amendment privilege has likewise been fully accomplished in the instant case. The State of Illinois has totally relinquished the right to criminally prosecute the petitioner for any offense shown in whole or in part by his immunized testimony before the Sangamon County grand jury. Petitioner's rights under the fifth amendment have been fully protected.

The State is not required, however, to allow the petitioner to continue to occupy the office of judge. Occupation of state judicial office is a privilege granted by the State, not a right secured by the federal or state constitutions. *Snowdon* v. *Hughes,* 321 U. S. 1, 7 (1944); *Cave* v. *State of*

Missouri ex rel. Newell, 246 U. S. 650 (1918); *Taylor and Marshall* v. *Beckham,* 178 U. S. 548 (1900). The State quite properly may condition the occupation of such an office upon compliance with reasonable rules of conduct. As the Supreme Court stated in *Wilson* v. *North Carolina,* 169 U. S. 586, 589 (1898):

> "In its internal administration the state (so far as concerns the federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court that the procedure by which an officer has been suspended or removed from office was regular, and was under a constitutional and valid statute, must generally be conclusive in this court."

Article VI, sect. 18 of the Illinois Constitution (1870) vested in the Illinois Courts Commission the power to remove a judge for cause. Supreme Court of Illinois Rule 51 implemented the constitutional provision by convening the Commission and establishing the procedures to be followed in proceedings before it. The Commission is composed of five judges, one judge of the state Supreme Court, two judges of the Appellate Court and two circuit judges. It is this body which is vested with the power to either discipline or remove a state judicial officer under the Illinois Constitution (1870). See Art. VI. Sect. 15 of the newly adopted Constitution which embodies the same provision with minor procedural changes.

Pursuant to its power under Art. VI sect. 19 of the state Constitution (1870), the Supreme Court of Illinois has convened a Judicial Conference. This Conference in 1964 readopted the Judicial Canons of Ethics which provide a guideline by which judges in Illinois are required to conduct themselves, both on and off the bench. A viola-

tion of these Canons subjects a judicial officer to discipline or to removal from the bench by the Illinois Courts Commission.

As he did in the court below, the petitioner appears to argue here that since the grand jury investigation did not center on his performance of his judicial duties, he was removed solely upon the basis of his personal behavior in his everyday life.[6]

He contends that since this personal behavior was not related to his judicial duties, Art. IV, sect. 4 of the Illinois Constitution (1870) which limits ineligibility for public office to criminal convictions for bribery, perjury or other infamous crime should govern. Thus, absent a criminal conviction for one of these offenses, he may not be removed from judicial office.

By pyramiding inapt and unwarranted factual conclusions, petitioner thus has reached a totally erroneous conclusion as to the applicable constitutional provision in this case. The fact that the Sangamon County Grand Jury was investigating alleged mismanagement of the Illinois State Fair, rather than inquiring into the official misconduct of a judge (which incidentally a grand jury has no power to do, as this function is vested solely in the Illinois Courts Commission) in no way precludes the conclusion that if a judge is called and testifies before the grand jury, that his testimony, as in the instant case, may reflect such impropriety of conduct as to justify his removal from the bench. This is true whether or not this

6. Petitioner also states that "his suspected conduct concerning State Fair contracts has been held criminally innocent in the court of criminal jurisdiction" (Petition 18). This statement is totally untrue. Petitioner was granted full transactional immunity in return for his grand jury testimony concerning his involvement with the Illinois State Fair. He has never been, nor can he be, subjected to criminal prosecution for the matters about which he gave testimony pursuant to the grant of immunity. Ill. Rev. Stat. 1969, Ch. 38, § 106-2.

testimony would establish either in whole or in part the commission of a criminal offense. The Judicial Canons of Ethics generally, and Canon 4 in particular, are based upon the premise that the personal and professional behavior of a judge are both relevant to a judge's qualifications to sit as a judicial officer. And further, they exact an admittedly higher standard of conduct from a judge than is required of other public employees. Thus, conduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause. *In the Matter of Napolitano*, 401 U. S. 951 (1971); *Friedman* v. *Court on the Judiciary of New York*, 375 U. S. 10 (1963); *Sarisohn* v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E. D. N. Y. 1967); *In Re Sarisohn*, 275 N. Y. S. 2d 355 (1966); *Matter of Osterman*, 13 N. Y. 2d a (1963), *cert. den., Osterman* v. *Court on the Judiciary of the State of New York;* 376 U. S. 914 (1964); *Matter of Kane* v. *Rudich*, 10 N. Y. S. 2d 929 (1939).

Petitioner's factual conclusion that he was removed only on the basis of personal behavior not involving his judicial functions is erroneous for two reasons. It is impossible to separate the behavior of a judge while off the bench from his conduct of cases before him for the purpose of assessing the totality of his qualifications to be a judge. See Judicial Canons of Ethics, Canon 4. And second, petitioner's testimony before the grand jury reflects the involvement of petitioner's position as a state judicial officer with the efficient functioning of his "personal" concession business. Petitioner appeared personally to obtain prime locations at the State Fair for others in return for a $1,000 fee. (T. 58) He engaged the services of an attorney who consistently appeared before the petitioner in Housing Court for the purpose of trying to reacquire concession contracts which petitioner had held

under ficticious names when the reorganized State Fair management relet the contracts in 1969 after being unable to locate the persons named in petitioner's 1968 contracts (Tr. 49). Petitioner solicited financial contributions to his political organization from persons to whom he sublet concession space contracts (Tr. 73), and he interrupted his court call to accept telephone communications relating to his concession business with the State Fair (Tr. 48). Petitioner's testimony clearly reflects the involvement of his judicial office with his concession business.

Petitioner's conclusion of law is equally incorrect. Although earlier constitutional provisions allowed the state legislature to remove a judge from office for cause and inferentially to prescribe standards of judicial conduct, the new Judicial Article which became effective January 1, 1964 replaced this provision with Art. VI, sect. 18 authorizing the creation of the Courts Commission and vesting the Supreme Court with authority to prescribe standards of judicial conduct. The legislature is totally without authority to define the qualifications for judicial office (as by defining what crimes are infamous) or to enact standards of judicial ethics. *Cusack* v. *Howlett*, 44 Ill. 2d 233 (1969). Article IV of the Constitution of 1870 creates the legislative department of the government of Illinois and has no application to the instant case.

Thus under the state constitution, the petitioner properly was removed from the office of judge. The sole question involving a federal right of the petitioner which he raised below and upon which he predicates the instant petition is whether testimony given pursuant to a valid grant of transactional immunity may be used as evidence in a civil removal proceeding consistently with the fifth amendment privilege against self-incrimination.

The opinions of this Court in *Gardner* v. *Broderick*, 392 U. S. 273 (1968) and *Uniform Sanitation Men Ass'n.* v.

Commissioner of Sanitation, 392 U. S. 280 (1968) indicate the proper resolution of this issue. In *Gardner*, this Court reviewed a provision of the New York City charter which provided for the discharge of a police officer for failure to sign a waiver of immunity from prosecution. Gardner, a New York City policeman, had been subpoenaed by a county grand jury investigating charges of bribery and police corruption in relation to certain gambling operations. The officer appeared before the grand jury and was advised that he would be questioned concerning his official duties. He was told of his fifth amendment privilege but was asked to sign a waiver of immunity from prosecution. He was also told that if he refused he would be fired. He refused to sign the waiver, an administrative hearing was held, and he was fired solely for his refusal. He appealed this decision on the ground that his dismissal from office for failure to waive immunity from criminal prosecution violated the privilege against self-incrimination.

The court found that the fifth amendment prohibits the coercion of a waiver of the immunity conferred by the privilege against self-incrimination through the threat of loss of employment. Gardner's testimony was sought not only to secure an accounting of his conduct as a public servant, but also as a basis for a later criminal prosecution of the officer. In rendering this decision, the court noted that if the only purpose in calling the officer to testify had been to obtain an accounting of the performance of his official duties, there would have been no reason to seek the waiver of immunity. (392 U. S. at 279). Such an accounting would be useless if the City lacked the power to discharge the officer should his immunized testimony reflect improper performance of his duties. The Court found that:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being

> required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself. *Garrity* v. *State of New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." (392 U. S. at 278)

The Court's opinion indicates that a public officer or employee who has been accorded the full protection of the fifth amendment privilege against self-incrimination by a grant of immunity from criminal prosecution, may be discharged from office either for failure to answer questions relating to the performance of his official duties or for the content of his answers when given pursuant to a valid grant of immunity.

This conclusion is reinforced by the companion decision in *Uniform Sanitation Men Ass'n., Inc., supra.* There this Court held that the fifth amendment privilege was violated by the discharge of City employees who refused to sign waivers of immunity when called to testify before a grand jury or who invoked the privilege in an administrative proceeding after being advised that their answers could be used against them in a criminal proceeding.

> "Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege." (392 U. S. at 283)

The court reiterated its statement in *Gardner* that if an employee's right to immunity is not at stake, he may be compelled to account for his performance of his official duties upon pain of dismissal. (392 U. S. at 284). The court concluded:

> "[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their

performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." (392 U. S. at 285)

It is clear from these decisions that a state may require a public servant to account for the performance of his duties upon pain of dismissal provided the officer or employee is accorded the full protection of the fifth amendment privilege against self-incrimination. Logic demands that if the employee's accounting reflects his ineligibility to continue in his employment or office, he may, after proper proceedings, be discharged or removed.[7]

In the instant case, the petitioner was accorded every possible protection guaranteed to him by the fifth amendment. By granting him full transactional immunity, the State has removed the element of criminality from his grand jury testimony. Having completely relinquished the right to hold him accountable for any criminal offense established by his testimony or its fruits, the State is free to require an accounting of petitioner's performanance of his public trust and to remove him from office upon a showing of improper conduct. As the court below held, the procedures by which the petitioner was removed from the office of Circuit Court judge comport fully with the requirements of the fifth amendment and must be sustained.

7. This conclusion has been adopted and applied by New York as a reasonable and constitutionally permissible means of disciplining attorneys. See Zuckerman v. Greason, 20 N. Y. 2d 430, 285 N. Y. S. 2d 231 N. E. 2d 718 (Ct. of App. 1967) cert. den. 390 U. S. 925 (1968); In Re Ungar, 282 N. Y. S. 2d 158 (S. Ct. App. Div. 1967); In Re Selig, 32 A. D. 2d 312, 302 N. Y. S. 2d 94 (S. Ct. App. Div. 1969); In Re Klebanoff, 21 N. Y. 2d 920, 289 N. Y. S. 2d 755, 237 N. E. 2d 75 (Ct. of App. 1968).

CONCLUSION.

For the aforementioned reasons, the Respondents herein respectfully request this Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570).

Attorneys for Respondents.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.